

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SIDNEY GORDON and JEFFREY TAUBER,

Plaintiffs,

v.

SONAR CAPITAL MANAGEMENT LLC, ET AL.,

Defendants.

11-cv-09665 (JSR)

**STATEMENT OF UNDISPUTED MATERIAL FACTS PURSUANT TO LOCAL CIVIL
RULE 56.1 IN SUPPORT OF DEFENDANTS SONAR CAPITAL MANAGEMENT,
LLC'S, SONAR PARTNERS, LP'S, SONAR INSTITUTIONAL FUND, LP'S, SONAR
OVERSEAS FUND, LTD.'S AND NEIL DRUKER'S
MOTION FOR SUMMARY JUDGMENT**

Defendants Sonar Capital Management, LLC (“Sonar”), Sonar Partners, LP, Sonar Institutional Fund, LP and Sonar Overseas Fund, Ltd. and Neil Druker (“Druker” and together, the “Sonar Defendants”) respectfully submit this statement of undisputed material facts as to which there is no genuine issue to be tried pursuant to Local Civil Rule 56.1 in support of the Sonar Defendants’ motion for an order pursuant to Fed. R. Civ. P. 56 granting them summary judgment dismissing the Third Amended Class Action Complaint (the “Complaint”).¹

Sonar and the Sonar Funds

1. At all relevant times, Sonar served as the investment adviser to Sonar Partners, LP (“Sonar Partners”), Sonar Institutional Fund, LP (“Sonar Institutional”) and Sonar Overseas Fund, Ltd. (“Sonar Overseas” and together with Sonar Partners and Sonar Institutional, the “Sonar Funds”). *See* Exs. 7 at SONAR000680, 8 at SONAR000479 and 9 at SONAR000768.

2. Sonar Partners was formed in or about November 12, 2003. Ex. 10. Sonar Overseas was formed in or about December 15, 2003. Ex. 11. Sonar Partners and Sonar Overseas began investing in or about January 2004. *See* Ex. 6 at 39:21-24.

3. Sonar Institutional was formed in or about March 10, 2004 and began investing shortly thereafter. Ex. 12.

4. The Sonar Funds traded *parri passu* with one another. *See* Ex. 6 at 248:3-249:15.

5. Neil Druker is the President and Chief Executive Officer of Sonar. *Id.* at 110:7-19. At all times, Neil Druker had sole trading authority in connection with trading in the Sonar Funds. *Id.* at 110:16-111:25; 117:11-117:18.

¹ References are to the Exhibits (Ex. __) annexed to the Affidavit of Mark J. Hyland, sworn to February 27, 2015, in Support of the Sonar Defendants’ Motion for Summary Judgment.

Noah Freeman and Tai Nguyen

6. Noah Freeman was hired by Sonar in or about early 2005. Ex. 2 at 28:18-22. During his employment, he held the title of Director of Technology Research and Managing Director of Technology Research. Ex. 6 at 174:5-18; 187:3-9.

7. Freeman's employment was terminated on or about May 13, 2008. *See id.* at 179:5-18, Exs. 2 at 75:17-76:6, and 14.

8. Tai Nguyen contacted Freeman in or about April 2005 regarding engaging Nguyen to provide research and analysis services for Sonar. *See* Ex. 15.

9. Insight Research is Nguyen's consulting firm through which he provided Services to Sonar. *See* Exs. 4 at 5, and 17.

10. Nguyen was retained to provide industry research primarily in the semiconductor industry, in which he had a background. Nguyen had previously worked at various companies in Silicon Valley, and considered himself an expert in the field. *See* Exs. 2 at 33:8-34:14, and 5 at 12:7-9.

11. Freeman caused Sonar to prepare a contract for Insight Research for consulting services on or about May 16, 2005. Ex. 16.

12. Prior to this time, Druker was not aware of Nguyen or Insight Research. *See* Ex. 6 at 9:24-10:11.

13. Druker did not participate in the negotiation of or otherwise participate in the drafting of the contract for Insight Research, but he did sign the contract on behalf of Sonar. *See Id.* at 14:21-15:13; 28:25-29:14; 31:3-33:10; 38:20-39:10, Exs. 16 and 17.

14. Freeman was the person primarily responsible for Sonar's relationship with Nguyen. Ex. 2 at 45:13-16.

15. While Freeman was employed by Sonar, Nguyen provided Freeman with his research and analysis on Sigma Designs, Inc. (“Sigma”) among other companies. *Id.* at 34:4-35:7.

16. Freeman was a defendant herein, settled with Plaintiffs and entered into a cooperation agreement with Plaintiffs. (Dkt. No. 69).

Sigma Designs, Inc.

17. Sigma is a designer and manufacturer of semiconductors for use in technologies such as set-top boxes for internet protocol television (“IPTV”), Blu-ray DVD players, and HDTVs. It is headquartered in Milpitas, California. Its stock is publicly traded on NASDAQ under the ticker symbol “SIGM.” Exs. 13, 25, 35, and 50.

18. The Sonar Hedge Funds had been investing in Sigma since they began their investment activities, before Freeman was hired. Ex. 6 at 231:18-232:12.

19. Sigma follows a February – January fiscal year. Its fiscal year is referred to by the calendar year in which its fourth fiscal quarter ends. For example, its 2008 fiscal year began on or about February 3, 2007 and ended on or about February 2, 2008. Ex. 48. In calendar year 2007, Sigma’s second quarter ended August 4, 2007 (Ex. 25), its third quarter ended November 3, 2007 (Ex. 35), and its fourth quarter ended February 2, 2008. Ex. 50.

20. During the relevant time, Sigma publicly released earnings information to the market generally several weeks after its fiscal quarter closed. *See* Exs. 23, 24, 33, 34, 48 and 49. Earnings reports were released after the market closed on the announcement dates. *Id.* Sigma management’s practice was to hold a conference call at 5 pm EST during which management provided some commentary on the results and permitted Wall Street analysts to ask questions. *Id.*

21. Sigma also released Form 10-Qs after the close of its first, second and third quarters, and a Form 10-K after the close of its fourth quarter, pursuant to Section 15(d) of the Securities Exchange Act of 1934. *See* Exs. 25, 35 and 50.

22. Many factors affect the pricing of stock following earnings calls. *See* Ex. 2 at 234:6-20.

23. During the relevant time, revenue information was just one of many data points that were released into the market on Sigma's earnings announcement dates. *See* Exs. 23, 33, and 48. The earnings reports included other data such as gross margins, costs, operating expenses, net income, accounts receivable, accounts payable, and, when applicable, commentary about design wins and competitive threats. *Id.*

24. During the relevant time, on the earnings calls, management discussed not only the content of the earnings reports but also provided color on the state of the industry, customer design activity, and significant trends. *See* Ex. 24, 34 and 49.

Sonar's Access To Information About Sigma

25. Sonar utilized numerous sources of information in covering semiconductor companies, including public filings, analyst reports, press reports, bank reports, conversations with bank analysts, conversations with management teams, people who work at the company and conversations with industry experts. Ex. 2 at 85:5-86:23.

26. Nguyen was not Sonar's only source of information about Sigma. *Id.* at 216:15-217:14.

27. Sonar subscribed to various publications that provided information on semiconductor companies. *Id.* at 94:9-13.

28. Sonar met with Sigma management on multiple occasions, including its Chief Executive Officer, Thinh Tran, its Vice President of Strategic Marketing, Ken Lowe, and others. *Id.* at 156:24-157:10; 158:10-16. On February 4, 2008, Sigma provided Sonar with a copy of its Roadshow Presentation. Ex. 38.

29. Sonar also received research reports from sell-side analysts who covered Sigma. These included SalesPulse Research (Ex. 20), Collins Stewart (Ex. 27), Roth Capital Partners (Ex. 28), Lazard Capital Markets (Ex. 29), Robert W. Baird & Co. (Ex. 30), Street Account (Ex. 39), American Technology Research (Ex. 36), Inflection Point Research (Ex. 37), and UBS (Ex. 47).

30. Analysts routinely constructed models to estimate Sigma's quarterly revenues, as well as other metrics like earnings per share ("EPS"), gross margin and price targets. *See, e.g.*, Ex. 19 at p. 2 ("Even on the basis o[f] our raised revenue estimates..."); p. 10 (model with estimates); Ex. 21 at p. 1 "Our estimates for FQ2 '07 are..."; Ex. 21 at p. 1 (chart with estimates); p. 6 (Chart – consensus estimates); Ex. 26 at p. 2 (chart showing estimates); Ex. 28 at p. 2 ("[we are] raising estimates"); and Ex. 29 at SONAR004796 (chart with estimates).

Freeman's and Nguyen's Communications Concerning Sigma

31. In his Sentencing Memorandum, Nguyen denied that he ever passed on material non-public information ("MNPI") except in connection with the company Abaxis. Ex. 4 at 7. At Nguyen's sentencing, his attorney repeated this statement. Ex. 5 at 9:8-24.

32. Freeman does not know who Nguyen's "source" was concerning Sigma. Ex. 2 at 50:17-54:16.

33. Specifically, Freeman does not know whether Nguyen's source was a relative of Nguyen. *Id.* at 50:17-54:16. Freeman does not know today whether Nguyen had a relative at Sigma. *Id.* at 196:2-196:15

34. Freeman does not know whether Nguyen's source was, in fact, a Sigma insider, or outsider, or whether Nguyen obtained information from a single source. *Id.* at 321:1-21.

35. Freeman does not know where Nguyen's Sigma information came from, and does not know if it was obtained improperly. *Id.* at 214:18-215:5.

36. Freeman does not know whether Nguyen's purported source at Sigma received any benefit from Nguyen. *Id.* at 51:21-52:13.

37. Freeman did not "conclude" that Nguyen's source, if any, must have worked in Sigma's Finance Department. *Id.* at 211:22-215:5. Instead, he "supposed" or "hypothesized" that any source of Nguyen worked in the Finance Department at Sigma based on others having the same last name, "Nguyen," but recognizing that Nguyen is "a very common Vietnamese name in a company full of Vietnamese people." *Id.* at 213:21-214:9; 325:5-19.

38. Druker did not speak with Nguyen while Freeman was employed at Sonar. Ex. 6 at 14:21-15:13.

39. The information concerning Sigma that Nguyen provided to Freeman was not of the sort that Freeman thought necessarily originated from within the company. Ex. 2 at 321:11-19.

40. Sigma's Director of Human Resources recently confirmed that there are 66 employees with the last name Nguyen employed at Sigma. *See* Ex. 57 at ¶4.

Freeman Cannot Corroborate the Alleged Tips

41. Freeman could not confirm the specific dates on which he is alleged to have spoken to Nguyen in the Complaint. Ex. 2 at 224:24-225:19; 239:21-240:1; 242:23-248:10.

42. Freeman confirmed the Motorola order had been common knowledge during the relevant time. *Id.* at 234:24-235:5.

43. Freeman could not recall what Nguyen told him about the number of chips ordered by Motorola during the period alleged in the Complaint. *Id.* at 237:16-238:9.

44. Freeman recalled telling Plaintiffs' counsel that Nguyen provided him in advance with ranges within which Sigma's actual revenues would fall, but he could not recall the specific ranges during the period alleged in the Complaint. *Id.* at 246:5-22.

Public Information Concerning Sigma During the Class Periods

45. On May 21, 2007, Williams Hay of Salespulse Research sent a research report that advised that "Industry contacts believe MOT [Motorola] is releasing a new generation VIP IPTV set top box based on the current platform with SIGM inside." Ex. 18 at 7885.

46. On July 13, 2007, Robert W. Baird & Co. released a report that, among other things, stated that "[a]t AT&T, Sigma Designs, which we believe now has the sole supplier position of H.264 decoders, should benefit from the continued ramp of U-Verse, which we believe will accelerate and represent a multi-million unit opportunity for Sigma in 2008. . . Sigma is now the sole supplier at AT&T Project Lightspeed (both at Motorola and Scientific Atlanta)." The report also notes that Sigma continues to gain market share in IPTV, and indicates that Baird was raising its price target to \$36. Ex. 19 at p. 2.

47. On July 31, 2007, Williams Hay of SalesPulse Research emailed Sonar a summary of their analysis on various stocks, including Sigma. In it, they note that they "believe MOT [Motorola] remains the sole source IPTV STB [set top box] supplier for Project Lightspeed and have heard of demand hitting a new record regarding order momentum...direct positive for SIGM." Ex. 20 at SONAR006773.

48. On August 27, 2007, C.E. Unterberg analyst John Vihn published a report stating "[w]e believe that speculation of a large incremental order from Motorola over the next

several quarters is in part responsible for the recent strength in shares of SIGM despite broader market weakness.” Ex. 21 at p. 1.

49. On August 28, 2007, Jeff Schreiner of American Technologies issued a report on Sigma which stated that: “For the last few weeks, we have heard what began as ambiguous speculation from several different clients as to new business opportunities with Motorola, has since become more specific regarding details from industry contacts pertaining to a large order for SIGM from MOT. This contract amounts to a six-figure order on a unit basis that could prove to be substantially larger. It is our view that if accurate, this business is not reflected in current consensus expectations. . . . We believe that this order is now widely known and expected by investors.” Ex. 22 at p. 2.

50. On August 29, 2007, after the close of the market, Sigma announced its second quarter 2008 (Q2 2008) earnings and held a conference call at 5pm EDT. *See* Exs. 23 and 24.

51. During the earnings call, Sigma reviewed a number of metrics including revenues, gross margins, operating expenses, net income, and projected growth in net revenues of 20% for the following quarter. Ex. 24 at pp. 2, 4 and 12.

52. On October 25, 2007, Collins Stewart released a report noting that “AT&T (T, \$41.55, NR) indicated that it expects to introduce a second source IPTV STB from Scientific-Atlanta on its U-Verse deployment, and confirms as we had previously indicated that it will be using a SIGM SOC. SFA had originally planned to use STM, but with the vendor designed out of Scientific-Atlanta’s IPTV STB, this gives SIGM a complete monopoly at AT&T’s U-Verse deployment.” The report also stated that “Motorola (MOT, \$18.55, NR) indicated that it had been supply constrained by production problems, but sees an extremely robust ramp ahead now

that these issues are behind them. Indicates that in addition to AT&T, that several tier-2 telcos coming out of trials are expected to see meaningful ramps moving forward. Currently, MOT exclusively uses SIGM's SOC in its STB." Ex. 26 at p. 1.

53. On October 29, 2007, John Vihn of Collins Stewart circulated a research update, noting that Sigma's Q3 2008 results will be driven by Microsoft-based deployments, particularly AT&T and seasonal demand for consumer electronic products Blu-Ray and HDTV, and giving Sigma a "buy" rating. Ex. 27.

54. On November 12, 2007, Roth Capital released a research report noting it will be raising its Sigma estimates based on IPTV demand, and that "Q3:08 Revenues Tracking Ahead of Expectations." Ex. 28.

55. On November 20, 2007, Lazard released a report on Sigma, affirming its Buy rating, anticipating another strong quarter. Ex. 29. That same day, Robert W. Baird & Co. released a report on Sigma, indicating it will outperform and recommending to Buy aggressively. Ex. 30.

56. On November 26, 2007, Collins Stewart released a report stating: "We are expecting SIGM to report strong October results above consensus estimates on both the top and bottom line." The report also states "Demand from MOT continues to be strong. Additionally, we believe that MOT IPTV STB shipments continue to see very strong demand. In addition to being the sole source providers of STB at AT&T's U-verse deployment, we believe that demand from Motorola remains very strong, as the OEM is also seeing extremely strong growth from its tier-2 carrier base, which have recently exited trials and begun taking production shipments of IPTV STBs." Ex. 31 at p. 1.

57. On November 27, 2007, UBS released a report on Sigma, in which it states that it expects upbeat results, and reiterates a Buy rating. Ex. 32.

58. On November 28, 2007, after the close of the market, Sigma released its third quarter 2008 (Q3 2008) earnings and held a conference call at 5pm EST. *See* Exs. 33 and 34.

59. During the call, management fielded questions on tax rate, market expectations going forward, expenses going forward, a potential transaction between AT&T and Echostar and its effect on Sigma, inventory levels, HDTV and Blu-Ray expectations, and gross margins. *See* Ex. 34.

60. On December 12, 2007, American Technology Research analyst Jeff Schreiner reported Sigma is facing competition in the IPTV market. Ex. 36 at SONAR004547-4553.

61. On January 7, 2008, an Inflection Point Research report notes that Broadcom has made inroads into the IPTV market and that Motorola has selected Broadcom for a new set-top box. Ex. 37.

62. On February 19, 2008, Street Account noted that Robert W. Baird & Co. decreased Sigma's price target from \$75 to \$50 citing "muted revenue outlook." Ex. 39.

63. On February 25, 2008, Roth Capital issued a report indicating that Sigma should have a strong fourth quarter but guidance for the next quarter may disappoint. Ex. 40 at SONAR001383. On that same day, Street Account reported Lazard is still rating SIGM a "Buy", noting that firms attribute recent weakness to concerns regarding excess inventory. Ex. 41 at SONAR001380.

64. On February 27, 2008, Street Account reported that ThinkEquity stated it was reducing its price target for Sigma as well, from \$100 to \$83. Ex. 42.

65. On March 4, 2008, RBC Capital Markets noted it was cutting its price target for Sigma from \$73 to \$35. RBC stated, “[w]e’re cutting our estimates for Sigma's upcoming quarter based on our view that some of its customers may be going through a digestion period. The ramp at major carriers for IPTV deployments continue but the growth is not without lumps and Sigma's April quarter revenue growth may not be as linear as in the past. Our April quarter estimate decreases from \$86M to \$77M and represents what may be a flat quarter from our January expectations.” Ex. 43 at p. 1.

66. On March 5, 2008, Collins Stewart noted that “[w]hile we expect SIGM to report strong FQ4’08 revenues above Street est of \$76M, we anticipate that investors will be focused on FQ1’09 guidance. We believe that SIGM will guide FQ1’09 revenues down q/q, as we anticipate the ramp of SFA’s IPTV STB at AT&T (T, \$34.87, NR) U-verse to impact sequential growth comps. We expect that double ordering at AT&T from both Motorola (MOT, \$9.93, NR) and SFA will lead to a precautionary inventory build of IPTV STBs, which could result in weaker than expected guidance in the April quarter.” See Exs. 44 and 45 at p. 1.

67. On March 10, 2008 Inflection Point Research noted Broadcom’s competitive push was a negative for Sigma in 2009. Ex. 46. That same day, a UBS research report indicated expecting in-line results for the fourth quarter, maintaining a Buy rating and price target, also noting a “ramp down by MOT [Motorola].” Ex. 47 at SONAR001035; 1082.

68. On March 12, 2008, after the market closed, Sigma released its fourth quarter 2008 (Q4 2008) financials and held an earnings call at 5 pm. See Exs. 48 and 49.

69. During that call, management indicated that “[o]ne of [Sigma’s] largest Telco accounts placed an order while set-top box customer which were apparently well above actual deployment. As a result, the order during [Sigma’s] first quarter [of 2009] will be much smaller than normal and the order rate for the second quarter [of 2009] should then resume at the ongoing rate of deployment.” Ex. 49 at p. 7.

70. Sigma beat market revenue expectations for the quarter. Ex. 51.

Sonar Trades

71. Sonar had been actively following and trading in Sigma stock since the Sonar Funds began trading. Ex. 6 at 39:22-24.

72. After the positive Robert W. Baird & Co. report was published on July 13, 2007, Sonar opened a position in Sigma on July 13, 2007 by purchasing 85,200 shares. Ex. 52 at Exhibit 3.

73. Sonar bought and sold Sigma stock throughout the period July 13 through November 28, 2007. *Id.*

74. The Sonar Funds sold 132,630 shares on August 3, 7 and 9. *Id.*

75. The Sonar Funds also sold 265,000 shares on August 27, 28 and 29, representing approximately 68.83% of its holdings in Sigma. *Id.*

76. Sigma’s second quarter earnings announcement was released after the close of the market on August 29, 2007. *See* Exs. 23 and 24.

77. On September 25 and 26, 2007, the Sonar Funds sold 151,550 shares. Ex. 52 at Exhibit 3.

78. On October 9 and 10, 2007, the Sonar Funds sold 178,551 shares. *Id.*

79. On November 28, 2007, the Sonar Funds sold 50,000 shares. Sigma's Q3 2008 earnings announcement was issued after the close of the market on November 28, 2007. *See* Exs. 33 and 34.

80. During the period December 20, 2007 through March 12, 2008, the Sonar Funds again both bought and sold Sigma stock. Ex. 52 at Exhibit 3.

81. On December 28 and 31, 2007, the Sonar Funds bought a total of 227,000 shares. *Id.*

82. On January 25, 2008, the Sonar Funds bought a total of 69,000 shares. *Id.*

83. On February 28 and 29, 2008, the Sonar Funds bought a total of 265,000 shares. *Id.*

84. And, on March 10, 2008, two days before the scheduled earnings call, the Sonar Funds purchased 345,000 shares, eliminating a short position. *Id.*

85. Sigma's Q4 2008 earnings announcement was issued after the markets closed on March 12, 2008. *See* Exs. 48 and 49.

Gordon's Trade

86. Gordon's trading during the Seller Class Period consisted of a single sale of 500 shares of Sigma stock on September 28, 2007. Ex. 54.

Tauber's Trades

87. Tauber ended the Seller Class Period owning 17,890 more shares on November 28, 2007 than at the beginning of the Seller Class Period on July 13, 2007. Ex. 52 at ¶108; Exhibit 5.

88. Examining Tauber's purchases and sales as of the dates Plaintiffs selected to be included in the Seller Class Period, Tauber has net zero shares as of the August 29, 2007

earnings report, and Tauber ended a net purchaser of 10,000 Sigma shares as of the November 28, 2007 earnings report. *Id.* at ¶108; FN93; Exhibit 5.

89. Tauber also ended the Buyer Class a net seller of 42,000 shares. *Id.* at ¶109; Exhibit 5.

90. Examining Tauber's purchases and sales as of the dates Plaintiffs selected to be included in the Buyer Class Period, Tauber sold all of the shares he purchased during the Buyer Class Period by January 9, 2008 – three months before the March 12, 2008 earnings call – and Tauber ended the Buyer Class Period a net seller of 12,000 shares. *Id.* at FN96; Exhibit 5.

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Respectfully submitted,

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